SUPREME COURT, U. S.

FILED

JUL 3 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 261

IN THE MATTER OF THE APPLICATION

OF

STANLEY M. KLEBANOFF, an Attorney,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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STANLEY M. KLEBANOFF, an Attorney,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the ruling of the Court of Appeals of the State of New York entered in the above, entitled cause on April 4, 1968.

Decisions Below

The decision of the Court of Appeals of the State of New York, reported officially 21 N. Y. 2d 920, and unofficially 289 N. Y. Supp. 2d 755, is annexed hereto as Appendix "A", which affirmed the order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Dept., the Court of original jurisdiction, reported officially, 27 A. D. 2d 332 and unofficially, 278 N. Y. S. 2d 993, which is similarly annexed hereto as Appendix "B".

Jurisdiction

The decision of the Court of Appeals of the State of New York was entered April 4, 1968. Jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1257 (3).

Questions Presented

1. Was it a violation of petitioner's Constitutional guarantees when, after petitioner testified before the Third Manhattan Grand Jury, pursuant to subpoena, without signing a waiver of immunity, and being a target of the investigation before the said Grand Jury for;

(a) Special Term, Supreme Court of the State of New York, to grant a motion brought on by the Co-ordinating Committee on Discipline of the Association of the Bar of the City of New York, without any notice to petitioner, for said committee to procure the petitioner's testimony before said Grand Jury for use against the petitioner in a subsequent disciplinary proceeding.

(b) The referee appointed by the Appellate Division of the Supreme Court of the State of New York, First Judicial Dept., upon the hearing of the disciplinary proceeding to permit testimony and evidence into the record secured from the leads supplied by said petitioner's testimony before the aforesaid Grand Jury under circumstances whereby petitioner should have received immunity, and further, admitting petitioner's actual testimony taken before said Grand Jury into evidence;

(c) The said Appellate Division to consider the tainted evidence upon the motion to confirm the referee's report, and upon confirmation based upon said tainted evidence, to strike this petitioner from the roll of attorneys of the State of New York.

2. Was it a violation of petitioner's constitutional guarantees against self incrimination when he testified in an investigatory stage of the disciplinary proceedings

brought against him under the fear and compulsion of, failure not to so testify would result in his disbarment, and subsequently, his coerced testimony and the leads flowing therefrom being introduced into evidence upon the hearing of the disciplinary proceeding; resulting in his disbarment.

Statutes Involved

(1) Code of Criminal Procedure §952-t (Appendix "C")

(2) Judiciary Law §90 (Appendix "D")

(3) Penal Law of the State of New York, §271, 272 (a), 320, 1202 and 1290 (Appendix "E").

Statement

The Constitutional questions here presented were raised for the first time on the appeal before the Court of Appeals of the State of New York, which, due to the fact that the Appellate Division was sitting as the Court of original jurisdiction, was the first Appellate Court to review this matter. The Court of Appeals in affirming the order of the Appellate Division of disbarment without opinion did not render a decision specifying its reasoning forming the basis of its decision, but did cite therein the case of *Zuckerman* v. *Greason,* 20 N. Y. 2d 430.

The petitioner was an attorney-at-law having been duly admitted to practice by the Appellate Division of the Supreme Court, of the State of New York, First Judicial Department, in December, 1950, and thereafter and following a disciplinary proceeding, has been disbarred by Order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, dated April 20, 1967 from which an appeal as of right

was taken, upon constitutional grounds, to the Court of Appeals of the State of New York where the order of the lower Court was affirmed without opinion.

The Petition is presented on the grounds that there were violations of the Constitution of the State and Federal governments affecting this petitioner in two areas; one, in connection with petitioner's testimony taken before the Third Manhattan Grand Jury for the December, 1964 Term; and the other, in connection with petitioner's testimony taken before the Co-Ordinating Committee on Discipline and before the referee upon the hearing of the disciplinary proceedings leading to his disbarment .

With regard to the first: the petitioner was subpoenaed to testify before the above Grand Jury on December 14, 1964, Appendix "G" and to produce certain papers and files in connection with an investigation before it of an employee of the petitioner, one Philip Weintraub and his activities in the practice of law. Philip Weintraub had previously resigned from the practice of law while under investigation for criminal and disciplinary charges for his activities in the practice of law, culminating in an order dated January 9, 1956 to desist and refrain in any manner from the practice of law. He had been in petitioner's employ in his law office from 1960 to 1964.

On December 14, 1964, pursuant to said subpoena, the petitioner did appear with the papers and files as directed and without signing a waiver of immunity, did testify before the Grand Jury in connection with its investigation of Philip Weintraub and his activities in the practice of law.

Subsequently, the Co-Ordinating Committee on Discipline made an *ex parte* application before a Special Term of the Supreme Court of the State of New York, County of New York, without any knowledge or notice to this

petitioner and secured an order dated June 22, 1965, permitting an inspection and receipt by the said Committee of the testimony of this petitioner given by him before the said Grand Jury.

Thereafter, by letters Appendix "H", and telephone calls, the petitioner was directed (by reason of *Cohen* v. *Hurley*, 366 U. S. 117, which was at that time the law of the land) to produce certain files, papers and supply information and testify under oath before the Co-Ordinating Committee on Discipline on June 29th, October 27th and November 22nd, 1965. That as a direct result of the testimony and information supplied by this petitioner, charges of professional misconduct were brought against the petitioner dated November 26, 1965, and further resulted in the entry of an order dated February 15, 1966, appointing a referee to take testimony inquiring into the conduct of the petitioner. That during this hearing, evidence was introduced consisting, not only of those files and records of the petitioner, which he was directed to produce, and his testimony before the Co-Ordinating Committee on Discipline, but also his testimony taken before the Grand Jury. Based upon all the evidence, including this self-incriminating evidence and the leads obtained therefrom, this petitioner was disbarred.

Reasons for Allowing the Writ

1. The Court of Appeals of the State of New York has decided the instant matter, involving a federal question of substance in a way not in accord with and in conflict with applicable decisions of this court, in that:

(a) The guarantees of the Fifth Amendment as to privilege against self incrimination and resultant

immunity is not conferred upon a defendant in a civil proceeding that is penal in nature.

(b) The threat of loss of job by disbarment, loss of professional standing, professional reputation and of livelihood, for failure to testify is not coercion and compulsion, as to rob one of his free choice to admit, to deny or to refuse to answer.

(c) It is the type of proceeding in which the privilege against self incrimination will or will not be permitted to be asserted and the test is not what is the disclosure sought, could it be used in a criminal prosecution or could it lead to other evidence that might be so used.

IT HAS IN EFFECT HELD:

Mr. Attorney, you may avail yourself of the constitutional guarantees of the Fifth Amendment privilege against self incrimination, in a disciplinary proceeding but, once having testified, whether due to compulsion, coercion or threat of job forfeiture, that testimony and the leads secured therefrom may be used in proceedings to disbar you:

This is not the law as handed down by this Court in *Garrity* v. *New Jersey,* 386 U. S. 493:

> "2. The threat of removal from public office under the forfeiture-of-office statute to induce the petitioners to forego the privilege against self incrimination secured by the Fourteenth Amendment rendered the resulting statements involuntary and therefor inadmissible in the state criminal proceedings".

The choice imposed on the petitioner in that case, as in this, was one between self incrimination or job forfeiture. For this petitioner's testimony was taken during the time that *Cohen* v. *Hurley,* 366 U. S. 117, was the law of the land and failure to testify, in and of itself, would subject petitioner to disbarment.

What is the logic behind stating: Mr. Attorney, you may avail yourself of the privilege against self incrimination being our Supreme Court has over-ruled *Cohen* v. *Hurley* by its decision in *Spevack* v. *Klein,* 385 U. S. 11, but that testimony taken under the authority of a case violating our constitutional guarantees against self incrimination and taken under compulsion, can still be used. We should not condone coerced privileged testimony being admissible to incriminate the witness.

That disciplinary proceedings are not criminal and to bring a witness within the protection of the Constitution, the disclosure asked of him must expose him to punishment for crime, as advanced by the Court of Appeals, in *Zuckerman* v. *Greason,* 20 N. Y. 2d 863, has no merit due to its limiting the scope of the Fifth Amendment. This Court in *Malloy* v. *Hogan,* 378 U. S. 1; in *Spevack* v. *Klein* and *Garrity* v. *New Jersey,* did re-affirm those principals dealing with the definition of "criminal" and the scope of the privilege against self incrimination as laid down in *Boyd* v. *U. S.,* 116 U. S. 616, at 633:

> "we are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal."

and further

> ". . . an acquittal on a criminal information was a good plea to a bar to a civil information for the forfeiture of goods, arising upon the same facts. As therefore, *suits for penalties and forfeitures incurred by the commission of offenses against the law, are of the quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness aaginst himself.*" (Emphasis supplied.)

And further, as stated in *Spevack* v. *Klein*, at page 514,

> "We said in *Malloy* v. *Hogan*:
>
> 'The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.' 378 U. S. at 82.
>
> In this context 'penalty' is not restricted to fine or imprisonment. It means, as we said in *Griffin* v. *California*, 380 U. S. 609, the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly' ".

This Court has ruled that the privilege against self incrimination may be availed of in an disciplinary proceeding is sufficient inference to hold that a disciplinary proceeding is not a civil proceeding, but one penal in nature. But to further support that inference, let us examine

§90 of the Judiciary Law, the authority for such proceedings, in light of *Huntington* v. *Attrill*, 146 U. S. 657. The Court said that the test of whether a statute is remedial or penal,

> "Depends upon the question whether its purpose is to punish an offense against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act. . . . The test is not by what name the statute is called by the legislature or the courts of the State in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person."

In *One 1958 Plymouth Sedan* v. *Commonwealth of Pennsylvania*, 380 U. S. 693, the state in a civil proceeding sought forfeiture of an automobile based upon evidence illegally obtained in violation of the Fourth Amendment. Pennsylvania had sustained the forfeiture on the ground that the Fourth Amendment applies only to criminal prosecutions and is not applicable in a forfeiture proceeding which the Pennsylvania Court deemed civil in nature, 414 Pa. 540, 201 A 2d 427; the Court acknowledging the *Boyd* decision and stated at page 697:

> "The information though technically a civil proceeding is in substance and effect a criminal one. . . . As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution."

Could we in all honesty say that such statute is not penal in nature, in light of the definitions above and in light of paragraph seven (7) of said section, stating:

> "... it shall be the *duty* of any district attorney ... to prosecute all proceedings for the removal or suspension of attorneys and counsellors-at-law." (Emphasis supplied.)

Is this not "to punish an offense against public justice of the state," and further, where it is,

> "ORDERED that the said Stanley M. Klebanoff be and he hereby is commanded to desist and refrain from the practice of the law in any form, either as principal or agent, clerk or employee of another. . . ." (order of the Appellate Division, First Department, dated April 20th, 1967, Appendix "F".)

Is this not a penalty and forfeiture, a yielding up of a public privilege, when any person, be he or she layman or convicted felon, adult or infant can be employed in a law office as a clerk, but not Stanley M. Klebanoff; and is it not penal in nature when Section Two (2) thereof provides:

> "... a violation thereof may be punished as a contempt of court."

and that contempt is criminal contempt (*Application of New York County Lawyers Association, in re Beran,* 273 App. Div. 524).

The further question presented is, should the rulings in *Spevack* and *Garrity* be applied retroactively or only prospectively? And if retroactively, should it be applied to cases not final and final cases (where judgment rendered, the availability of appeal exhausted and the time to petition for certiorari elapsed) or just to the former.

For purposes of this matter, we are only concerned with application of the above rules retroactively in cases that are not final. As to this problem, and light of *Johnson* v. *State of New Jersey,* 384 U. S. 719, counsel believed that this Court has indicated that in cases that are not final, the *Spevack* case, which incorporated *Gerrity,* should be applied retroactively. For in *Zuckerman and Haber* v. *Greason,* 386 U. S. 15, upon review by certiorari, this Court vacated the order of the Appellate Division and remanded the case to the Court for reconsideration in light of *Spevack* v. *Klein.* The mandate further stated that this was done in order that such proceedings might be had "as accord with right and justice, and the Constitution and laws of the United States."

Haber had not previously raised the constitutional grounds for his appeal before, nor had he objected to the introduction of the alleged tainted evidence, and the Court by its remand, did direct the Appellate Division to give retroactive effect to the *Spevack* case.

2. The Court of Appeals of the State of New York has decided an important question of federal law which has not been, but should be settled by this court.

(a) The Court of Appeals of the State of New York by affirming the order of the Appellate Division without opinion has decided that immunity conferred upon a party during a criminal proceeding will not protect that party upon a subsequent civil proceeding that is penal in nature; further

(b) This Court has ruled that a party may assert his privilege against self incrimination in a civil proceeding that is penal in nature but the Court of Appeals had decided that where a party is compelled to testify in a civil proceeding that is penal in nature

no immunity attaches. Thus limiting the effect of the Fifth Amendment.

(c) That where a party has the right to remain silent and assert by his constitutional guarantees granted under the Fifth Amendment and is compelled to testify; the resultant immunity is not as broad in scope as was the privilege against self incrimination.

The Court of Appeals by affirming the order of the Appellate Division, without opinion; just referring to *Zuckerman* v. *Greason,* has stated *Matter of Rouss,* 221 N. Y. 81 (relied on therein) to be the law. This matter was one dealing with an attorney compelled to give testimony in a criminal matter and who received immunity in the criminal proceeding. Thereafter, in proceedings to disbar, the argument was raised that *Rouss'* testimony before the criminal proceedings could not be introduced in the disciplinary proceeding as a result of the immunity received. The Court struck down this argument and held the evidence admissible, the heading stating at page 82:

"3. Disbarment is not a penalty or forfeiture within the meaning of the statute (Penal Law, §584) providing that no person shall be excused from testifying on any trial for a violation of article 54 of that law (which defines and punishes conspiracy), upon the ground that the testimony required of him may tend to subject him to a penalty or forfeiture, and providing further that no person shall be subjected to any penalty or forfeiture on account of anything concerning which he may so testify, and that no testimony so given shall be received against him upon any criminal investigation, proceeding or trial. Hence, an attorney is not immune from discipline by reason of having given testimony on a trial,

which was in substance a confession of the acts for which he is liable to disbarment."

The theory behind immunity was set forth in *People ex rel. Hunt* v. *Lane,* 132 App. Div. 406, 409; 196 N. Y. 520. That a statute giving immunity against incrimination, penalty or forfeiture, should be construed to effect a practical and beneficial purpose, namely, at the same time to secure the witness in his constitutional right and to permit the prosecuting officer to secure the evidence of a crime. It should not be construed so as to unduly impede, hinder or obstruct the administration of criminal justice, and the witness is protected not only from indictment, but also from use of said evidence.

If a witness could object to testify after receiving immunity on the ground that he would still be subject to penalty or forfeiture, it would not permit the prosecuting officer to secure evidence of a crime and would destroy the entire theory behind the granting of immunity. It would establish a twilight zone wherein the prosecutor, willing to grant immunity and the witness still able to stand mute; a zone in which immunity is imperfect and disclosure still avoidable.

But this is not the law, in 1964 *Malloy* v. *Hogan,* overruled earlier decisions and held that the Fifth Amendment privilege against self incrimination is binding upon the States and that the same constitutional standards must be used in Federal and State action. Further, in *Murphy* v. *The New York Harbor Waterfront Committee,* the scope of the privilege was enunciated by the Court and it was held that the constitutional privilege against self incrimination protects a State witness against incrimination from Federal as well as State Law and a Federal witness against incrimination under State as well as Federal Law. Further, in the *Malloy* case, the Court did reaffirm the principals as

laid down in *Boyd* v. *U. S.*, that the scope of said privilege against self-incrimination applied not only in criminal cases, but also Civil cases involving a penalty or forfeiture.

That these basic constitutional guarantees were violated,

(1) where, with the purpose in mind of disciplinary action and forfeiture of petitioner's proprietary right to practice as an attorney, the Grand Jury minutes of the petitioner's testimony, he being clothed with immunity, whether by *ex parte* order of the Supreme Court, or without such order, was turned over to the Co-Ordinating Committee on Discipline;

(2) When the Co-Ordinating Committee on Discipline upon further investigation of the leads supplied by the petitioner's own testimony before the Grand Jury, did procure further illegal evidence to be used against the petitioner in a proceeding to forfeit his office; and

(3) When the actual Grand Jury minutes and the evidence procured as a result of further investigation of those Grand Jury minutes was used as a basis to prefer quasi-criminal charges against the petitioner and thereafter, during proceedings to disbar him, to introduce this illegal evidence into the record.

It was stated in *Malloy*:

> "The, right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own free will, and to suffer no penalty . . . for such silence" is guaranteed by the Fifth Amendment Federally and Statewise through the Fourteenth Amendment of the United States Constitution. (*Griffin* v. *California,* 380 U. S. 609 and *Boyd* v. *U. S.*)

and, the immunity granted, being as broad as the privilege.

The right of a person to speak under a grant of immunity and to suffer no penalty for such speech is likewise guaranteed by the Fifth Amendment.

The petitioner's testimony before the Grand Jury resulted in the following charges in essence being brought against the petitioner upon the disciplinary proceeding:

Charge 1: Petitioner employed Weintraub, whose name had been struck from the roll of attorneys and who was prohibited from practicing law, stating in said charge:

> "Respondent nevertheless, made extensive use of the services of the said Weintraub in that, among other duties, Weintraub negotiated with the agents of various insurance carriers to effect the settlement of the personal injury claims of respondent's clients, interviewed clients, prepared clients for examination, and in other ways, comported himself in the manner of an attorney."

Was there not present a conspiracy in violation of sections 271 (unlawful for anyone except attorneys to practice law) and 272a (unlawful for attorney removed from office to practice law) of the Penal Law and was not this within the scope of the investigation before the Grand Jury.

Charge 2 and 3: Submission of false medical bills in more than three cases and false Bills of Particulars to insurance carriers (in which Weintraub was implicated).

Was there not present a violation of section 320 (Barratry); section 1202 (presentment of false insurance claims) and section 1290 (larceny) of the Penal Law and wasn't this also within the scope of the investigation before the Grand Jury.

The fact that the District Attorney's Office did not prosecute this petitioner has no bearing upon the question here presented, but could he prosecute, is the test.

As a potential defendant testifying pursuant to subpoena without executing a waiver of immunity, before the Grand Jury, that testimony was testimony given under compulsion and in violation of the guarantees of the State and Federal Constitutions against self incrimination. That testimony or its fruits may not be used against the petitioner for any purpose. That immunity not only protects him from indictment based upon any self-incriminating testimony he may give at the investigation, but also bars the use of such evidence.

3. The charges against the petitioner were sustained solely on the basis of tainted and illegal evidence.

Petitioner was found guilty of the following charges which lead to the forfeiture of his office.

Charge 1: Employing in petitioner's law office, a person whose name had previously been struck from the roll of attorneys (Philip Weintraub).

Charge 2: Submitting false medical bills and reports.

Charge 3: Submitting false Bills of Particulars.

Charge 6: Co-mingling funds.

Charge 8: Failure to file statements of retainer.

Charge 9: Failure to file closing statements.

The evidence forming the basis of the decision disbarring the petitioner was all illegal and tainted evidence secured from the lips of this petitioner while either under the protection of immunity or while under compulsion of disbarment.

As to Charge 1 (employment of former attorney prohibited to practice.

This stems directly as a result of appellant's testimony before the Grand Jury; at page 2 thereof:

> "Q. Did Philip Weintraub work for you? A. Yes, he did.
>
> Q. Between what dates? A. Between 1961 and 1964."

and at page 13:

> "Q. Did you know when he worked for you that he had been an attorney? A. Yes, I did know.
>
> Q. And you knew he had been disbarred? A. Yes, but I was informed by him that he was able to work in a law office and this is the reason I had hired him."

The petitioner receiving immunity as a result of his testifying before the Grand Jury, while a potential defendant, under the compulsion of subpoena and without signing a waiver of immunity, this charge was illegally brought against him and must be dismissed.

The evidence relied upon by the referee in sustaining this charge is set forth in his report dated and filed December 14, 1966: at page 3:

> "In his answer, *respondent admits* he employed the said Weintraub." (Emphasis supplied.)

at page 4:

> "Upon the trial, petitioners produced evidence as to Weintraub's duties and responsibilities in respondent's office by introducing a *written stipulation between the parties.*" (Emphasis supplied.)

and starting at page 9:

> "On December 14, 1964, respondent appeared before the Grand Jury as a witness for the People against Weintraub and was questioned by Assistant District Attorney (continuing at page 10) Frank Clark:
>
> "Q. Did you know when he (Weintraub) worked for you that he had been an attorney? A. Yes, I did know."

Regardless of petitioner's immunity as to this charge, the above was the evidence produced to sustain said charge and it has been supplied solely by the words of the petitioner while under the compulsion of . . . testify or forfeit your office . . . testimony that is in violation of the constitutional guarantees as set forth in *Spevack* and *Gerrity*.

As to Charge 2: (*false medical bills and reports*).

There was presented before the referee during the disciplinary proceeding, an array of witnesses, Schrock, Delavato, Sr. and Jr., Dwyer, Levine and Dr. Margulies (p. 26) to prove the charge of false medical bills and reports (of Dr. Margulies and Dr. Bobrow) presented to insurance carriers.

Again this testimony emanates as a direct result of the hearings before the Grand Jury and the investigation of the District Attorney's Office, and all this evidence was tainted.

The Schrock file was subpoenaed before the said Grand Jury and introduced into evidence before it (testimony of petitioner before Grand Jury page 6, introduced as Exhibit 9).

It is Dr. Margulies' report and bill that was submitted in the Schrock file (as well as in the Delavato Sr. and Jr., Dwyer and Zeilner Cases).

The file of Doris Rosenberg was also introduced into evidence before the Grand Jury (appellant's testimony before it, p. 5, Exhibit 3) and it is Dr. Bobrow's report and bill that was submitted therein. This is the same Dr. Bobrow that petitioner has been charged in connection with the Levine file.

Further, and although the Delavato Sr. and Jr., Dwyer, Zeilner and Levine files were not introduced into the testimony of the petitioner before the Grand Jury by the Assistant District Attorney, these files were furnished to the District Attorney's Office by the appellant and were before said office during its entire investigation and presentation before the Grand Jury.

Every file in which petitioner has been charged with submitting false medical bills and reports were before the District Attorney's Office and files (Schrock and Rosenberg) in which Drs. Margulies and Bobrow appeared were subpoenaed before the Grand Jury and introduced in that proceeding. Aside from the immunity petitioner should have received, the evidence introduced at the disciplinary proceeding, the testimony of Dr. Margulies, Messrs. Delavato Jr. and Sr.; Schrock, Dwyer, Zeilner and Levine was a direct result of further investigation of those Grand Jury proceedings.

Further, at the direction of the Co-Ordinating Committee on Discipline: each of the above files were turned over to the Committee by the Petitioner, again under the compulsion of the *Cohen* case, for the purpose of this petitioner supplying evidence to be used against himself in a subsequent disciplinary proceeding and again in violation of those constitutional guarantees of the Fifth and Four-

teenth Amendments of the United States Constitution and Article I, Section 6 of our State Constitution.

The referee stated in his opinion with regard to the evidence submitted at page 39 of his report:

> "The conclusion is inescapable that it was Weintraub who, finding no medical certificates in the files, and realizing the need to prove special damages, drafted the false medical bills and forged the names of Dr. Margulies and Dr. Bobrow on their purported statements in order to falsely inflate each claim."

Wasn't this charge within the scope of the Grand Jury investigation? And didn't the scope of that inquiry, fairly considered in the light of all the circumstances, involve this petitioner by reason of his testimony so as to confer automatic immunity upon him and to *Bar* the use of this evidence and all evidence flowing from further investigation of this evidence.

As to Charge 3: (*false bills of particulars*).

This charge flows directly from charge 2. In three of the matters, constituting two actions, wherein petitioner was charged with the submission of false medical bills and reports, a verified Bill of Particulars was prepared and forwarded to the insurance carriers.

The referee stated in his report at page 27:

> "The bill of particulars verified by respondent in each of the said two actions, contained the same admittedly false representations to insurance carriers *and constitute the basis for Charge No. 3,* infra." (Emphasis supplied.)

and for the reasoning above stated, this charge must similarly be dismissed.

As to Charge 6: (*Co-mingling of funds*).

This charge was sustained solely as a result of appellant's testimony given under compulsion before the Co-Ordinating Committee on Discipline and as a result of petitioner's bank records submitted by him to said Committee under this direction.

During the petitioner's testimony before the Co-Ordinating Committee on Discipline on June 29, 1965 at page 25, these questions were asked and answered as follows:

> "Q. Do you use your special account for any disbursements arising out of the operation of your law practice? A. I try not to sir. I don't know. There perhaps have been occasions when I have, but I don't remember specific instances, but I try not to.
>
> Q. Have there ever been occasions in which you have put an insurance carrier draft in your regular account? A. There may be, yes,"

and at page 26:

> "Q. From what account do you make a check payable to your client in a personal injury action? A. Usually from my special account."

and at page 27:

> "Q. Again you say usually? A. Yes, but there have been instances, I believe, that I have paid a client from my regular account and I have deposited insurance checks directly into this regular account."

and at page 32:

> "Mr. Cometa: At this time I would like to make a request that when we meet next you supply the Committee with cancelled checks, stub books and statements on both the special and regular accounts on the First National City 195 Broadway branch for the period beginning July 1, 1960 and ending June 30, 1965."

That this request was adhered to by petitioner and it was upon the above illegal evidence that this charge was sustained.

As to Charges 8 and 9: (*failure to file statements of retainer and closing statements*).

As in other charges, these charges were sustained upon evidence that the petitioner was required to furnish the Committee, and as gleaned from the record before the referee during the hearing of the discipline proceeding, at page 132:

> "Mr. Cometa: Finally in connection with charges made under designations 8 and 9 in the petition, the petitioner would like to offer the original schedules prepared for completion by Mr. Klebanoff. These schedules are in relation to the filing of statements of retainer and closing statements, and I might state that the schedules themselves are not filled in because the respondent, through his attorney, conceded that a certain number of statements of retainer and closing statements had not in fact been filed by the respondent during the time period in question, and respondent's answer reflects that posture."

and at page 133:

> "Mr. Cometa: I offer the original schedules, there are five in number bound together with a paper clip, collectively as Petitioner's Exhibit 17. (Five schedules re filing of statements of retainer and closing statements received in evidence as Petitioner's Exhibit 17)"

shows that the only evidence received to support these charges was the admissions of this petitioner, admissions made under compulsion.

Petitioner has shown that of the charges that were sustained, charge by charge, the evidence to support a finding of guilt in each case was a direct result of testimony or exhibits furnished by this petitioner against himself at a time when it was not his free choice to admit, to deny, or to refuse to answer, but a choice of compulsion, robbing him of his free, rational and voluntary choice to remain silent, a silence that would result in his forfeiture of office and a choice that was one of . . . "the rock or the whirlpool."

3. The questions involved are of great public importance. The power of administrative agencies and their scope of influence and authority grows each year as does the number of people they employ and the number of people under their control and subpoena power. It is necessary to clearly define law and to what extent the constitutional guarantees of the Fifth Amendment apply to these administrative agencies in connection with their quasi judicial hearing practices and in particular, how attorneys are effected when they give testimony, under compulsion, during a disciplinary proceeding brought against them and during an investigation conducted by a Grand Jury.

CONCLUSION

For the reasons hereinabove stated, it is respectfully submitted that this petition for writ of certiorari be granted.

Respectfully submitted,

HENRY G. McDONOUGH,
McDONOUGH, SCHNEIDER & MARCUS,
349 East 149th Street,
Bronx, New York 10451.

K. RICHARD MARCUS,
on the Brief.

APPENDIX A

Decision of Court of Appeals

COURT OF APPEALS

State of New York, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 4th day of April in the year of our Lord one thousand nine hundred and sixty-eight, before the Judges of said Court.

Witness,

The HON. STANLEY H. FULD,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur April 4, 1968

I. No. 35 68

In the Matter of

STANLEY M. KLEBANOFF, an Attorney,
Appellant,

Co-Ordinating Committee on Discipline,
Respondent.

BE IT REMEMBERED, That on the 5th day of February in the year of our Lord one thousand nine hundred and sixty-eight, Stanley M. Klebanoff, an Attorney, the appellant in this cause, came here unto the Court of Appeals, by Henry G. McDonough, his attorney, and filed in the

said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Co-Ordinating Committee on Discipline, the respondent in said cause, afterwards appeared in said Court of Appeals by Angelo T. Cometa, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Henry G. McDonough, of counsel for the appellant, and by Mr. Angelo T. Cometa, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

(See *Matter of Zuckerman* 20 N Y 2d 430, Cert. denied —— U. S. ——, 36 U. S. L. W. 3308, decided January 29, 1968.)

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, First Judicial Department, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of

the Supreme Court, First Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the
State of New York.

Court of Appeals, Clerk's Office,
Albany, April 4, 1968.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

(SEAL—STATE OF NEW YORK—COURT OF APPEALS)

APPENDIX B

Decision of Appellate Division, First Department

Before STEVENS, J. P., and CAPOZZOLI, TILZER, RABIN, and MCGIVERN, JJ.

PER CURIAM.

Respondent was admitted to the Bar in the First Judicial Department in December, 1950. He is charged with having employed in his law office a former attorney whose name had been struck from the roll of attorneys, of submission of false medical bills, of preparation and service of false bills of particulars, of commingling funds and of failure to file 883 statements of retainer and 395 closing statements. The report of the Referee sustained the foregoing charges. The respondent does not seek disaffirmance of any of the findings of the Referee, but hopes that we will find in the record support for his plea in mitigation.

The report of the Referee is confirmed. The findings disclose that the respondent, though a comparatively young man (39 years of age), in sixteen years of practice involving negligence cases in the thousands, was guilty of professional misconduct on a wholesale scale and of a massive failure to comply with the rules of this Court. The record is devoid of mitigating circumstances which would lead us to condone his wrongful acts. Respondent should be disbarred.

Respondent disbarred effective May 19, 1967.

All concur.

APPENDIX C

Code of Criminal Procedure

§952-t. STENOGRAPHERS' DUTIES

It shall be lawful for any stenographer duly appointed and qualified as hereinbefore provided, to attend and be present at the session of every grand jury impaneled in the county in which he is appointed, and it shall be his duty to take in shorthand or upon a typewriting machine the testimony introduced before such grand juries, and, except when his original notes and minutes and the exhibits pertaining thereto have been impounded as hereinafter provided for, to furnish to the district attorney of such county a full copy of all such testimony as such district attorney shall require, but he shall not permit any other person to take a copy of the same, nor of any portion thereof, nor to read the same, or any portion thereof, except upon the written order of the court duly made after hearing the said district attorney provided, however, that the judge presiding over the term of court for which any grand jury is drawn, may at any time during the sitting of such grand jury and upon petition signed by its foreman or acting foreman and certified by its clerk to have been authorized by twelve or more of the grand jurors constituting such grand jury, impound the stenographer's original notes and minutes and the exhibits pertaining thereto, or any portion of such original notes, minutes, and exhibits, and may order them to be delivered to him and placed in his custody or in the custody of a public officer named by him. When so impounded, such original notes, minutes, and exhibits shall not be taken from the custody of such judge or such public officer except upon the order of such judge, who, upon the written requisition of the foreman or acting foreman

of such grand jury, shall deliver them or order them to be delivered to such foreman or action[1] foreman for use in the grand jury room during the hours when the grand jury is actually in session. Except as above provided, all of the said original notes and minutes shall be kept in custody of said district attorney, and neither the same, nor a copy of the same, or any portion of the same, shall be taken from the office of said district attorney, excepting as above provided. Nothing contained in this section, however, shall be construed to prohibit a grand jury from inspecting its own minutes and exhibits while in session. Added L. 1909, c. 66, §4; amended L. 1941, c. 914, §1, eff. Sept. 1, 1941.

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[1] So in original. Probably should read "acting".

APPENDIX D

Judiciary Law

§90. ADMISSION TO AND REMOVAL FROM PRACTICE BY APPELLATE DIVISION; CHARACTER COMMITTEES

1. a. Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

b. Upon the application, pursuant to the rules of the court of appeals, of any person who has been admitted to practice law in another state or territory or the District of Columbia of the United States, or in a foreign country, to be admitted to practice as an attorney and counsellor-at-law in the courts of this state without taking the regular bar examination, the appellate division of the supreme court in the department in which such person is an actual resident at the time of such application, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law, in all the courts of this state, provided, that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

c. The members of the committee appointed by the appellate division in each department to investigate the character and fitness of applicants for admission to the bar, shall be entitled to their necessary traveling, hotel and other expenses, incurred in the performance of their duties, payable by the state out of moneys appropriated therefor, upon certificate of the presiding justice of the appellate division by which such committee is appointed.

d. The committee on character and fitness appointed by the appellate division of the supreme court in the first judicial department and the committee on character and fitness appointed by the appellate division of the supreme court of the second judicial department, may each, with the written consent of the justices of each of such appellate divisions or a majority of such justices, acting for their respective appellate divisions, from time to time, appoint and remove a secretary, stenographers and assistants, and procure a suitable office for each committee, properly furnished and equipped and all books, stationery, blanks, postal cards, expressage and postage stamps as shall be required for the proper performance of the duties of each such committee.

e. The salaries of such secretary, stenographers and assistants shall be fixed for each department by the justices of the appellate division in each department or a majority of them in each department.

f. The salaries of such secretary, stenographers and assistants and the necessary expenses under the terms of this act in the first judicial department, shall, in the said first judicial department, be paid by the comptroller of the city of New York.

g. The salaries of such secretary, stenographers and assistants and the necessary expenses under the terms of

this act in the second judicial department shall be certified by the presiding justice of such department to the state comptroller who shall audit the same. The state department of taxation and finance shall pay such salaries and expenses and shall apportion the same among the counties comprising the second judicial department. Such counties shall reimburse the state for such compensation. The time and method of such apportionment and the time and method of such reimbursement shall be as specified in section seventy-four of this chapter.

2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

It shall be the duty of the appellate division to insert in each order of suspension or removal hereafter rendered a provision which shall command the attorney and counsellor-at-law thereafter to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another. In addition it shall forbid the performance of any of the following acts, to wit:

Appendix D

a. The appearance as an attorney or counsellor-at-law before any court, judge, justice, board, commission or other public authority.

b. The giving to another of an opinion as to the law or its application, or of any advice in relation thereto.

In case of suspension only, the order may limit the command to the period of time within which such suspension shall continue, and if justice so requires may further limit the scope thereof.

If an attorney and counsellor-at-law has been heretofore removed from office, the appellate division shall upon application of any attorney and counsellor-at-law, or of any incorporated bar association, and upon such notice to the respondent as may be required, amend the order of removal by adding thereto as a part thereof, provisions similar to those required to be inserted in orders hereafter made.

If a certified copy of such order or of such amended order, be served upon the attorney and counsellor-at-law suspended or removed from office, a violation thereof may be punished as a contempt of court.

3. The suspension or removal of an attorney or counsellor-at-law, by the appellate division of the supreme court, operates as a suspension or removal in every court of the state.

4. Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.

Appendix D

Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys.

5. Upon a reversal of the conviction for felony of an attorney and counsellor-at-law, or pardon by the president of the United States or governor of this state, the appellate division shall have power to vacate or modify such order or debarment.

6. Before an attorney or counsellor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense. In all cases where the charges are served in any manner other than personally, and the attorney and counsellor-at-law so served does not appear, an application may be made by such attorney or in his behalf to the presiding justice of the appellate division of the supreme court to whom the charges were presented at any time within one year after the rendition of the judgment, or final order of suspension or removal, and upon good cause shown and upon such terms as may be deemed just by such presiding justice, such attorney and counsellor-at-law must be allowed to defend himself against such charges.

Appendix D

The justices of the appellate division in any judicial department, or a majority of them, may make an order directing the expenses of any disciplinary proceedings, and the necessary costs and disbursements of the petitioner in prosecuting such charges, including the expense of any preliminary investigation in relation to professional conduct of an attorney and counsellor-at-law, to be paid by the county treasurer of a county within the judicial department, which expenses shall be a charge upon such county.

7. In addition to the duties prescribed by section seven hundred of the county law, it shall be the duty of any district attorney within a department, when so designated by the justices of the appellate division of the supreme court in such department, or a majority of them, to prosecute all proceedings for the removal or suspension of attorneys and counsellors-at-law or the said justices, or a majority of them may appoint any attorney and counsellor-at-law to conduct a preliminary investigation and to prosecute any disciplinary proceedings and, during or upon the termination of the investigation or proceedings, may fix the compensation to be paid to such attorney and counsellor-at-law for the services rendered which compensation shall be a charge against the county specified in his certificate and shall be paid thereon.

8. Any petitioner or respondent in a disciplinary proceeding against an attorney or counsellor-at-law under this section, including a bar association or any other corporation or association, shall have the right to appeal to the court of appeals from a final order of any appellate division in such proceedings upon questions of law involved therein, subject to the limitations prescribed by article six, section seven, of the constitution of this state.[1]

9. No objection shall be taken to the appointment of any member of the bar to act as referee or judge in a disciplinary proceeding under this section on the ground that he is a member of a bar association or other corporation or association which is the petitioner therein.

10. Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records.

APPENDIX E

Penal Law of the State of New York

§271. NONE BUT ATTORNEYS TO PRACTICE IN THE STATE

No natural person shall ask or receive, directly or indirectly, compensation for appearing for a person other than himself as attorney in any court or before any magistrate, or for preparing deeds, mortgages, assignments, discharges, leases or any other instruments affecting real estate, wills, codicils, or any other instrument affecting the disposition of property after death, or decedents' estates, or pleadings of any kind in any action brought before any court of record in this state, or make it a business to practice for another as an attorney in any court or before any magistrate unless he has been regularly admitted to practice, as an attorney or counselor, in the courts of record of the state; but nothing in this section shall apply (1) to officers of societies for the prevention of cruelty, duly appointed, when exercising the special powers conferred upon such corporations under section one hundred and twenty-one of the membership corporations law; or (2) to law students in their senior or final year of law school acting under the supervision of a legal aid organization whose existence, organization or incorporation is approved by the appellate division of the supreme court of the department in which the principal office of such organization is located, when such students are acting under a program approved by that appellate division and specifying the extent to which the students may engage in activities otherwise prohibited by this statute. As amended L. 1965, c. 877, §2, eff. July 16, 1965.

Appendix E

§272–a. Practice of law by attorney who has been disbarred, suspended, or convicted of a felony

Any person whose admission to practice as an attorney and counselor-at-law has been revoked or who has been removed from office as attorney and counselor-at-law or, being an attorney and counselor-at-law, has been convicted of a felony or has been suspended from practice and has not been duly and regularly reinstated, who does any act forbidden by the provisions of this article to be done by any person not regularly admitted to practice law in the courts of record of this state, unless the judgment, decree or order suspending him shall permit such act, shall be guilty of a misdemeanor.

§320. Common barratry defined

Common barratry is the practice of exciting groundless judicial proceedings.

§1202. Presenting false proofs of loss in support of claim upon policy of insurance

A person who knowing it to be such:

1. Presents, or causes to be presented, a false or fraudulent claim, or any proof in support of such a claim, for the payment of a loss upon a contract of insurance; or,

2. Prepares, makes or subscribes a false or fraudulent account, certificate, affidavit or proof of loss, or other document or writing, with intent that the same may be presented or used in support of such a claim,

Is punishable by imprisonment for not more than five years, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment.

Appendix E

§1290. LARCENY DEFINED

A person who, with the intent to deprive or defraud another of the use and benefit of property or to appropriate the same to the use of the taker, or of any other person other than the true owner, wrongfully takes, obtains or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind, steals such property and is guilty of larceny.

Hereafter it shall be immaterial in, and no defense to, a prosecution for larceny that: 1. The accused obtained possession of, or title to, such property with the consent of the person from whom he obtained it, provided he induced such consent by a false or fraudulent representation, pretense, token, or writing; or

2. The accused in the first instance obtained possession of, or title to, such property lawfully, provided he subsequently wrongfully withheld or appropriated such property to his own use or the use of any person not entitled to the use and benefit of such property; or

3. The person from whom the accused obtained such property intended to part with title to, as well as possession of, such property, or with possession as well as title; or

4. The purpose for which the owner was induced to part with possession of such property was immoral or unworthy.

APPENDIX F

Order of Appellate Division, First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 20th day of April, 1967.

Present—Hon. Harold A. Stevens,
Justice Presiding,
" Louis J. Capozzoli,
" George Tilzer,
" Benjamin J. Rabin,
" Owen McGivern,
Justices.

M-1195

In the Matter
of
Stanley M. Klebanoff,
an Attorney.

William Piel, Jr., Magnus Lipton and Samuel Ross Ballin, as members of the Co-Ordinating Committee on Discipline of The Association of the Bar of the City of New York, The New York County Lawyers' Association and Bronx County Bar Association, by Angelo T. Cometa, Esq., their attorney, having presented to this Court on the 7th day of December, 1965, a petition containing charges of professional misconduct against the above-named respondent, Stanley M. Klebanoff, who was ad-

mitted to practice as an attorney and counselor-at-law in the State of New York, on the 4th day of December, 1950, at a term of the Appellate Division of the Supreme Court, First Judicial Department, and having petitioned the Court to take such action upon such charges as in the judgment of said Court justice may require; and the respondent having appeared herein by his attorney, Carl J. Rubino, Esq., and having interposed an answer to said petition, duly verified the 17th day of January, 1966, and the Court having duly made and entered an order on the 15th day of February, 1966, appointing Hugo Pollock, Esq., as Referee herein to take testimony in regard to said charges and to report to this Court his opinion thereon; and the parties having entered into a stipulation approved by Hugo Pollock, Esq., the Referee herein, dated May 25, 1966, withdrawing Charge No. 4 from the petition herein; and a hearing, pursuant to said order of reference having been duly held before the said Referee and the said Referee having duly heard the testimony and proofs tendered by the parties hereto, and having thereafter rendered his report thereon to this Court, which report was dated the 14th day of December, 1966, and was filed in the office of the Clerk of this Court on the 20th day of December, 1966;

And the petitioner thereafter and on the 28th day of February, 1967, having moved for an order confirming the Referee's report and adjudging the respondent guilty of professional misconduct and that the Court take such action herein as it might deem just and proper;

Now, upon reading the petition of the Co-Ordinating Committee on Discipline, verified the 26th day of November, 1965, the affidavit of Angelo T. Cometa, Esq., annexed thereto, sworn to the 26th day of November, 1965, the

notice of presentation of said petition, dated the 26th day of November, 1965, with proof of due service thereof upon the respondent, the answer of the respondent to said petition, verified the 17th day of January, 1966, the order of this Court, dated the 15th day of February, 1966, appointing Hugo Pollock, Esq., as Referee herein, all of which papers were duly filed in the office of the Clerk of this Court on the 15th day of February, 1966, the report of Hugo Pollock, Esq., the Referee herein, dated the 14th day of December, 1966, together with the testimony taken by him and the exhibits offered in evidence, which were filed in the office of the Clerk of this Court on the 20th day of December, 1966; and upon reading and filing the notice of motion for an order confirming the report of the Referee and adjudging the respondent guilty of professional misconduct, dated the 11th day of January, 1967, with proof of due service thereof, and after hearing Mr. Angelo T. Cometa for the motion, and Mr. Carl J. Rubino, appearing on behalf of respondent, and due deliberation having been had thereon; and the Court having unanimously found and decided that the respondent has been guilty of professional misconduct in his office of attorney and counselor-at-law, it is hereby unanimously

Ordered that the report of Hugo Pollock, Esq., the Referee herein, filed in the office of the Clerk of this Court on the 20th day of December, 1966, be, and the same herby is, confirmed; and it is further unanimously

Ordered that the said Stanley M. Klebanoff be and he hereby is disbarred from practice as an attorney and counselor-at-law in the State of New York effective May. 19, 1967; and it is further unanimously

Ordered that the name of the said Stanley M. Klebanoff be struck from the roll of attorneys and counselors-at-law

in the State of New York effective May 19, 1967; and it is further unanimously

Ordered that the said Stanley M. Klebanoff be and he hereby is commanded to desist and refrain from the practice of the law in any form, either as principal or agent, clerk or employee of another, effective May 19, 1967; and it is further unanimously

Ordered that the said Stanley M. Klebanoff be and he hereby is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, effective May 19, 1967; and it is further unanimously

Ordered that the said Stanley M. Klebanoff be and he hereby is forbidden to give to another an opinion as to the law or its application or any advice in relation thereto effective May 19, 1967.

Enter:

HYMAN W. GAMSO
Clerk.

APPENDIX G

Subpoena to Testify Before Grand Jury

SUBPOENA (Duces Tecum) FOR A WITNESS TO ATTEND THE GRAND JURY

In the Name of the People of the State of New York.
To Stanley M. Klebanoff of No. 15 Park Row Room 610 N. Y. C.

YOU ARE COMMANDED to appear before the Grand Jury of the County of New York, at the Grand Jury Room, in the ninth story of the Criminal Courts Building, at 155 Leonard Street, between Centre and Baxter Streets, in the Borough of Manhattan of The City of New York, on the 14th day of December, 1964, at the hour of 2 P. M. of the same day, as a witness in a criminal action prosecuted by the People of the State of New York against Philip R. Weintraub and that you bring with you and produce, at the time and place aforesaid,

The following case files:

Michael Flood vs. Dr. Carroll Davis

Edward Tolentino vs. Miguel Troche

Thomas Norton vs. Dial A Car Rental System Inc.

Doris Rosenberg vs. Jack Bess

Anthony Carlino vs. Keffas Bros Co. Inc.

Isaac Jones vs. Harry Coon

Gregorio Gonzales vs. Efraim Santiago

Mary Bautista vs. Simone Kirschenbaum

William T. Schrock vs. Frank Craig

now in your custody, and all other deeds, evidences and writings which you have in your custody or power concerning the premises, and for a Failure to Attend you will be deemed guilty of a Criminal Contempt of Court, and liable to a Fine of Two Hundred and Fifty Dollars and Imprisonment for thirty days and to be prosecuted and punished for a misdemeanor.

Dated at the Borough aforesaid, in the County of New York, the 2 day of December 1964.

FRANK S. HOGAN, District Attorney.

APPENDIX H

Letter of September 15, 1965

CO-ORDINATING COMMITTEE ON DISCIPLINE
Room 1535
100 Centre Street
New York 13, N. Y.

September 15, 1965

CONFIDENTIAL

Carl Rubino, Esq.
200 Park Avenue
New York, N. Y. 10017

Re: Stanley M. Klebanoff

Dear Mr. Rubino:

Will you please arrange to furnish us with the following:

(1) The completed list of Mr. Klebanoff's cases, setting forth the dates upon which Statements of Retainer and Closing Statements were filed.

(2) The names of clients in negligence cases in which Mr. Klebanoff was not retained on a contingent basis, and the dates he was retained.

(3) All of Mr. Klebanoff's cancelled checks, bank statements and check stubs from 1960 to June, 1965, including the cancelled checks and check stubs evidencing loans to Louis Nessim and cancelled distribution checks given to Nessim after settlement of his personal injury claims.

(4) Mr. Klebanoff's files relating to Nessim's personal injury claims.

(5) Mr. Klebanoff's files relating to personal injury claimants referred to him by Nessim.

(6) Mr. Klebanoff's files relating to the personal injury claims of the following named clients:

Mary Bautista
Anthony Carlino
Robert A. Carn
Michael Flood, an infant
Gregorio and Maria Gonzalez
Isaac Jones
Eugene Levine
Jewel Morales
Thomas Norton
Albert Pretto
Willie Rivers
Doris Rosenberg
William T. Schrock
Rose Stabin
Olga Tolentino

Your prompt attention to our request will be appreciated.

We have enclosed a copy of this letter which you may wish to send to Mr. Klebanoff.

Very truly yours,

ANGELO T. COMETA
Counsel to the Committee

By
JAMES J. FITZPATRICK
Assistant Counsel

JJF/lab
Enclosure

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 27 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 261

In the Matter of the Application of
STANLEY M. KLEBANOFF, an Attorney,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION

ANGELO T. COMETA
Attorney for Respondents
36 West 44th Street
New York, New York 10036

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 261

In the Matter of the Application of

STANLEY M. KLEBANOFF, an Attorney,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION

Statement of the Case

This is a petition for a writ of certiorari to review an order of the Court of Appeals of the State of New York entered on April 4, 1968, affirming an order of the Appellate Division, First Department disbarring petitioner.

On December 7, 1965, respondents, members of the Coordinating Committee on Discipline, presented to the Appellate Division, a petition charging petitioner Stanley M. Klebanoff with professional misconduct. The petition alleged that, in the course of their continuing inquiry conducted pursuant to an order of the Appellate Division, respondents had inquired into the professional conduct of petitioner as an attorney and counselor-at-law; and that, in the course of such inquiry, petitioner had testified before

the Committee on three occasions. The petition further alleged that, as part of its inquiry, the Committee had examined records maintained by petitioner and others, including official agencies. None of these allegations were disputed by petitioner during the proceedings below. The professional misconduct alleged in the petition included employment in petitioner's law offices of one who had resigned from the Bar and was enjoined from the practice of law (charge 1); submission of false medical reports and bills (charge 2) and false bills of particulars (charge 3) to insurance carriers in personal injury cases; systematic commingling of petitioner's personal funds with moneys recovered upon clients' claims (charge 6); and failure to file statements of retainer and closing statements in violation of the rules of the Appellate Division, First Department (charges 8 and 9).

Petitioner filed an answer, verified January 17, 1966, in which charges 1, 6, 8 and 9 were expressly admitted and the essential allegations of charges 2 and 3 impliedly so (petitioner pleaded lack of knowledge of the falsity of the bills, reports, and bills of particulars referred to in the charges). In addition, the answer set forth allegations in mitigation of the admissions pertaining to charges 1, 2 and 6, and other matters not here relevant. No argument was advanced, by answer or motion, that the Appellate Division should dismiss the petition on the ground that the inquiry on which it was based had been unconstitutional. On February 15, 1966, the court appointed Hugo Pollock, Esq., referee to take testimony with regard to the charges and report to the court.

Four days of hearings were held before the referee. Respondents called seven witnesses and introduced twenty-

nine exhibits, nine of which were objected to for the first time on petitioner's appeal to the Court of Appeals: a portion of the transcript of petitioner's testimony before the Third Manhattan Grand Jury for the December, 1964 term (Ex. 11) and the order authorizing respondents' access to that testimony (Ex. 10); the transcript of petitioner's testimony before the Co-ordinating Committee (Ex. 12); five schedules of personal injury cases in which petitioner admitted his failure to file statements of retainer and/or closing statements (Ex. 17); and certain of petitioner's bank records (Exhibits 21-25, including two checkbooks, one check, one deposit slip, and a three-page bank statement).[1] Seven of these exhibits were received in evidence upon petitioner's express statement that he had "no objection";[2] as to Exhibit 23, petitioner was silent (T. 356).

Petitioner testified in his own behalf and offered four exhibits. At the conclusion of his testimony, which occupied three of the four days of hearings (T. 140-390), petitioner requested and received the referee's permission to

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[1] Exhibits 16 and 20, which are also checks drawn on petitioner's bank account, related solely to charges 4, 5 and 7. Transcript of the hearings before the referee (hereafter cited T. —), pp. 131-132; 272-280. Charge 4 was withdrawn by stipulation during trial, and charges 5 and 7 were not sustained by the referee. Referee's report (hereafter cited R. —), pp. 45-53. Those charges—and the evidence pertaining to them—are accordingly not involved here.

[2] T. 231 (Ex. 11), 355 (Exs. 21, 22), 337 (Exs. 24, 25), 279 (Ex. 12). As to Exhibit 12, the transcript of petitioner's testimony before the Co-ordinating Committee, an objection was at first interposed to the scope of the offer, to the extent that the transcript might be used to impeach petitioner's testimony before the referee on the basis of an inconsistency not inquired into upon cross-examination (T. 371). Upon respondents' express limitation of the offer to exclude the purpose objected to (T. 378), petitioner consented *in haec verba* to the introduction of the entire transcript (T. 378-379).

read into the record a prepared statement summarizing his ill health, recognition of his past "mistakes," and intention to conduct himself differently in the future (T. 390-393).

Referee Pollock's report, filed December 14, 1966, sustained the six charges of professional misconduct discussed above. By order of April 20, 1967, the Appellate Division unanimously confirmed the report of the referee and ordered petitioner disbarred effective May 19, 1967. On May 17, 1967, petitioner brought on an order to show cause why he should not be granted an extension of the time to move for reargument, and of the effective date of his disbarment. An affidavit of Carl Rubino, Esq., counsel for petitioner, in support of the application, included the following statements (pp. 3-4).

> I recognize that on consideration of a motion for reargument, respondent will bear a heavy burden. Due to the nature of the proceeding herein, and particularly because of the charges respondent has admitted, the burden is even heavier than in most cases. . . . The record herein contains substantial evidence in mitigation of the charges sustained against respondent. . . . In preparing to seek reconsideration, I have painstakingly reviewed the entire record herein. I believe that, given some further time to prepare the moving papers, it will be possible to present effectively to the Court matter which will cause it to conclude that imposition of less severe punishment is warranted.

The Appellate Division by order of June 6, 1967, extended petitioner's time to move for reargument and postponed the effective date of his disbarment to June 20, 1967. Petitioner filed his motion for reargument and reconsideration

on June 15, 1967. Among the grounds advanced for reconsideration and the imposition of a penalty less severe than disbarment were a declaration that petitioner "realizes and is most heartily sorry for his carelessness in permitting wrongs to be done in his office" and the following argument:

> . . . respondent's complete frankness and cooperation throughout the proceedings against him should weigh in his favor. As the Referee said, he
>
> '. . . cooperated by making a number of concessions and by voluntarily producing requested files, books, bank statements and other records. His counsel waived the appearance of a number of witnesses including some, whose testimony would have been essential to qualify for admission some of petitioners' 29 exhibits and thus helped to expedite the hearings.' (Referee's Report, page 2.)
>
> This was done because both respondent and deponent considered it the proper course of conduct for an attorney under investigation. But we respectfully suggest that the abstinence from resort to any of the tactics which could have made the inquiry more difficult should be considered by the Court. The policy should be to encourage such frankness and cooperation by giving such conduct significant consideration on the issue of imposition of punishment.[3]

Petitioner's motion was denied by order of the Appellate Division dated June 29, 1967, and his disbarment became effective on July 6, 1967.

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[3] Affidavit of Carl Rubino, Esq., counsel for petitioner as respondent below, dated June 15, 1967, pp. 10-11.

ARGUMENT

I.

Petitioner did not timely raise the claim underlying the petition for certiorari.

Throughout the proceedings below, petitioner placed principal reliance on the theory that his voluntary co-operation was a factor directly relevant to the Appellate Division's determination of the sanction appropriate to his admitted professional misconduct. It was not until his disbarment, upon his appeal to the Court of Appeals, that petitioner first contended that his co-operation was not, after all, voluntary, and that the self-serving testimony on which he based his plea for a mitigated penalty should have been excluded.

Petitioner's objections are of the kind that could have been obviated if they had been raised below. Had petitioner there attacked the constitutionality of the disciplinary proceeding on the ground that respondent's use of his testimony before the grand jury was unconstitutional, respondents would have had an opportunity to introduce evidence of petitioner's professional misconduct from a number of sources unrelated to the grand jury minutes. If, after considering such evidence, the Appellate Division had nevertheless accepted petitioner's contention that the proceeding was founded upon a fatal constitutional defect, it could have dismissed the petition at the outset, and spared the parties and the public the time and expense of trial, judgment and appeal. Similarly, if petitioner had objected to the introduction before the referee of the evidence whose use against him he now characterizes as un-

constitutional, respondents would have had an opportunity to prove by independent evidence the facts which were the subject of petitioner's admissions. For example, if the court below had held that petitioner's confession of failure to file statements of retainer and closing statements was inadmissible in evidence against him upon a new trial, respondents would have been required to call the persons charged by law with custody of these documents to testify whether their achives contain any documents filed by or on behalf of petitioner. Such testimony could, of course, have been adduced before the Referee in 1966, if petitioner had made timely objection to the offer of Exhibit 17; he should not, therefore, be heard to object to it now.

Petitioner's failure to raise these issues below was not, however, a mere passive waiver of objections. Rather, it was his very theory of the case. Petitioner well knew that respondents could have proved all the charges just as conclusively without his admissions, whether judicial or testimonial, of material facts. Had he stood upon his claim of constitutional privilege and elected not to testify in his own behalf, however, the record would have been devoid of even a colorable defense, and it is hard to conceive of the Appellate Division's imposing any penalty short of disbarment. By electing instead to co-operate, petitioner, who had no defense on the facts, supplied himself with one on the law, asking the court to consider his co-operation a mitigating factor and base upon it the assessment of a penalty less severe than disbarment.

Furthermore, although he was in fact disbarred, petitioner nevertheless did benefit from asserting co-operation as his theory of the case in the court below: he was granted an extension of time within which to file a motion for

reargument, and the effective date of his disbarment was postponed, after he filed moving papers in which this theory was relied upon.

Petitioner chose the strategy of candor over the privilege of silence, and the Appellate Division rejected his defense. He sought in the Court of Appeals and now seeks on this petition, to repudiate his unavailing election, and test whether an alternative approach to the "free choice to admit, to deny, or to refuse to answer" (*Lisenba* v. *California,* 314 U. S. 219, 241) will effect a more palatable result. The manifest injustice of such a course is abundantly clear, and it is respectfully urged that this Court should accordingly decline to consider the constitutional issues raised in such a way.

II.

Petitioner's constitutional challenge to the institution and prosecution of the disciplinary proceeding should be rejected.

Petitioner's attack upon the disciplinary proceeding rests upon the Fifth Amendment to the Constitution of the United States, which provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." Petitioner first asserts that he was a "target of the investigation," thus being subject to indictment arising out of the matters under investigation. Consequently, he argues, his testimony before the grand jury was evidence "against himself" in violation of his constitutional right. Assuming, then, that his testimony before the grand jury was unconstitutionally compelled, he invokes a line of cases holding that evidence elicited in violation of con-

stitutional right may not be used against the defendant in a criminal case. In an attempt to bring himself within the holding of these cases, he characterizes a disciplinary proceeding as a criminal case, and argues that the order of the Supreme Court granting respondents access to his testimony before the grand jury amounted, in effect, to an unconstitutional use of his testimony against him.

Respondents are in agreement with the Court of Appeals on the definition of a disciplinary proceeding as one *not* criminal in nature. *Matter of Rouss*, 221 N. Y. 81 was found to be dispositive of the issues in the court below. Just as petitioner was called as a witness in a "criminal case"—*i.e.*, the grand jury's investigation of Philip Weintraub—Rouss was called as a witness in the criminal trial of another; whereas petitioner asserts an implied immunity, arising from the circumstances under which he was called, Rouss was granted statutory immunity. There, as here, the testimony given under immunity from criminal prosecution was introduced in a disciplinary proceeding, and the attorney appealed his disbarment on the same grounds urged by petitioner herein—that the immunity from prosecution he acquired by testifying barred the use of his testimony not only in a criminal case, but in a disbarment proceeding as well. Judge Cardozo, writing for a unanimous Court, rejected this contention:

> A proceeding looking to disbarment is not a criminal case. We do not suggest that the witness is protected by the Constitution only when testifying in the criminal courts. The law is settled to the contrary. But to bring him within the protection of the Constitution, the disclosure asked of him must expose him to punishment for crime. . . . We think that section 584 of the Penal Law was designed to give an immunity

> as broad as the constitutional privilege, and no broader. [221 N. Y. at 86, 116 N. E. at 784.]

Nor did *Spevack* v. *Klein,* 385 U. S. 511, extend the scope of the privilege—or immunity flowing from it—beyond the boundaries defined in *Rouss.* That was a proceeding pursuant to Judiciary Law, §90(2), in which the sole charge of professional misconduct was that the attorney had "refused to honor a subpoena duces tecum duly served upon him, in that he had refused to produce his financial records and had refused to testify before the [Brooklyn Judicial Inquiry]; and that such refusal constituted a breach of his inherent duty as an attorney and counselor at law to divulge to the court all pertinent information bearing upon his character and fitness and upon his conduct and practices as a lawyer." *Matter of Spevack,* 24 A. D. 2d 653. His sole defense was "that the production of the records and his testimony would tend to incriminate him." 385 U. S. at 512-513. The Appellate Division, on the authority of *Cohen* v. *Hurley,* 366 U. S. 117, *aff'g Matter of Cohen,* 7 N. Y. 2d 488, held that the attorney's refusal to testify was a failure "in his inherent duty to the court to divulge all pertinent information necessary to show his character and fitness to remain a member of the Bar and necessary to the proper administration of justice." 24 A. D. 2d at 654. The Court of Appeals affirmed, 16 N. Y. 2d 1048, 1050,

> . . . on the authority of *Cohen* v. *Hurley* (366 U. S. 117) and on the further ground that the Fifth Amendment privilege does not apply to a demand, not for oral testimony, but that an attorney produce records required by law to be kept by him (*Davis* v. *United States,* 328 U. S. 582; *Shapiro* v. *United States,* 335 U. S. 1).

The Supreme Court found it unnecessary to reach the question whether the required-records doctrine rendered the privilege inapplicable to certain of the records involved in the *Spevack* case, since the proceedings below had "proceeded on the basis that petitioner could invoke the privilege with respect to the records, but that the price he might have to pay was disbarment." 385 U. S. at 517-518. The question presented, then was the constitutionality of that price:

> And so the question emerges whether the principle of *Malloy* v. *Hogan* is inapplicable because petitioner is a member of the Bar. We conclude that *Cohen* v. *Hurley* should be overruled, that the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it. [385 U. S. at 514].

The *Spevack* holding is directed solely to the *type of proceeding* in which the privilege protects against self-incriminating disclosures; it does not alter or expand the *type of disclosure* which is protected against. This distinction, implicit in *Spevack*, is made explicit in *Application of Gault*, 387 U. S. 1:

> . . . the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites.

Justice Fortas, writing for the majority in *Gault*, then goes on to adopt the precise language in which the scope

of the privilege was defined in Justice White's concurring opinion in *Murphy*:

> . . . it protects any disclosures which the witness may reasonably apprehend could be used in a *criminal prosecution* or which could lead to other evidence that might be so used. [278 U. S. at 94, quoted with approval, 87 S. Ct. at 1454 (emphasis supplied)].

It is accordingly clear that *Matter of Rouss* is still the law in New York and the Court of Appeals has recently so held in *Matter of Zuckerman,* 20 N. Y. 2d 430, 438-439, *cert. denied,* 390 U. S. 925:

> The evidence which these appellants produced before the Referee cannot be used against them in any criminal proceeding. They had no privilege against making disclosure usable only in a disciplinary proceeding. The constitutional privilege applies only in the case of evidence which might be used against them in a criminal case under the language of the Fifth Amendment. Haber and Zuckerman may have thought that unless they produced this evidence they would be disbarred under *Cohen* v. *Hurley,* but neither [*Garrity* v. *New Jersey,* 385 U. S. 493 (1967)] nor *Spevack* confers upon them a constitutional privilege to withhold evidence which cannot lead to criminal prosecution and bears only upon their right to continue to practice law.

The theory on which appellant predicates his appeal is that he acquired immunity from criminal prosecution when he was subpoenaed to give testimony before the grand jury. Consequently, the use of that testimony cannot "expose him to punishment for crime" as Spevack's could have,

but, like Zuckerman's "bears only upon [his] right to continue to practice law." The Fifth Amendment does not, therefore, prohibit the court from disciplining appellant for professional misconduct disclosed in his grand jury testimony.

Petitioner's reliance upon *Boyd* v. *United States,* 116 U. S. 616 and *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U. S. 693 is equally misplaced. As this Court noted in *Plymouth Sedan,* the *Boyd* situation required a determination that the criminal law had been violated, the forfeiture there sought being authorized as an alternative to imprisonment and/or fine in the same statute. Consequently, if the claimant there were compelled to give testimony, he would be asked to provide evidence to establish a violation of what this Court concluded was essentially a criminal statute, *i.e.,* to incriminate himself.

This Court has held that disciplinary proceedings are civil rather than criminal in nature, ***Ex Parte Wall,*** 107 U. S. 265, 288. Its rules concerning the discipline of attorneys admitted to its bar have been predicated upon that assumption. Thus, where it is shown to this Court that any member of its bar has been guilty of misconduct, he is forthwith suspended from practice and thereupon offered the opportunity to show good cause why he should not be disbarred (Revised Rule 8). Contrary to the procedure applicable to criminal cases, the "accused" is thereby required to come forward to explain his conduct.

Petitioner never established that he was a potential defendant in the criminal investigation which led to his grand jury appearance. There is nothing in the record from which this Court may determine what the scope of the grand jury's inquiry was. In his brief, petitioner poses a

number of rhetorical questions concerning the nature of the grand jury's inquiry; this technique does not, of course, compensate for his omission to introduce below any evidence tending to show that he was in fact within its scope.

Even assuming, *arguendo,* that petitioner was a target of the grand jury's investigation and was in fact immunized against criminal prosecution, such immunity does not extend to disciplinary proceedings. In an effort to overcome the clear wording of the constitutional provision, petitioner argues that this Court's ruling that the Fifth Amendment privilege is available to respondents in disciplinary proceedings as stated in *Spevack* v. *Klein,* 385 U. S. 511 "is sufficient inference to hold that a disciplinary proceeding is not a civil proceeding, but one penal in nature." It is submitted that no decision of this Court warrants such a conclusion.

Moreover, this Court has only recently denied certiorari in an application somewhat analogous to the instant matter. In *Kaufman* v. *The Association of the Bar of the City of New York,* 25 A. D. 2d 48, *cert. denied,* 389 U. S. 1006, petitioner sought to bring a disciplinary proceeding within the meaning of "a criminal case" for purposes of Fifth Amendment application. Respondent in that case presented several sound policy considerations which clearly mitigate against expanding the scope of the Fifth Amendment to include disciplinary proceedings. See also: *Ungar* v. *The Association of the Bar of the City of New York,* 27 A. D. 2d 925, *cert. denied,* 385 U. S. 1006.

Petitioner also cites *Garrity* v. *New Jersey,* 385 U. S. 493 in support of his contention that a disciplinary proceeding is penal or criminal in nature. In *Garrity,* the Court prohibited the use by the prosecution at a *criminal trial* of

testimony compelled by threat of loss of job upon refusal to answer for any reason. The Court concluded that the testimony elicited and sought to be used in support of criminal charges against the defendants had been improperly compelled. Thus it can readily be seen that the Court was not expanding the scope of the privilege but rather addressed itself to the effect of state conduct as constituting improper compulsion exerted upon an individual in order to force him to waive his existing privilege against self-incrimination in the *conventional sense.*

It is abundantly clear that petitioner's attempt to extend the scope of the Fifth Amendment privilege must be rejected. Two recent decisions of this Court make petitioner's position untenable. In *Gardner* v. *Broderick,* 36 LW 4536, decided on June 10, 1968, the Court held (at 4537): "If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity* v. *New Jersey, supra,* the privilege against self-incrimination would not have been a bar to his dismissal." And, in a companion case decided the same day as *Gardner,* Mr. Justice Fortas noted that ". . . if New York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the Constitutional privilege, and if they had refused to do so, this case would be entirely different." *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation,* 36 LW 4534, 4535.

III.

Petitioner's contention that this Court's decision in *Spevack* v. *Klein* warrants retroactive application is without merit.

In deciding *Spevack,* this Court gave no indication whether application would be retroactive or prospective only. However, in *Johnson* v. *New Jersey,* 384 U. S. 719, the Court made it clear that the rules announced would have retroactive effect only if the evidence in question was of doubtful reliability and relevancy. The obvious import of such a caveat is that the danger of convicting the innocent should be avoided. Certainly no claim is made here that the evidence which petitioner now calls "tainted" and "coerced" was either inaccurate or unreliable. Indeed, it may be stated that in the context of disciplinary proceedings generally, there is little, if any opportunity to challenge the reliability or relevancy of the evidence. It is thus clear that *Spevack* should be, by the *Johnson* standard, given prospective effect only.

It is also noted that this Court has denied retroactivity to many of the recent constitutional guidelines announced in relation to the rights of criminal defendants. See: *Miranda* v. *Arizona,* 384 U. S. 436; *Escobedo* v. *Illinois,* 378 U. S. 478; and *Tehan* v. *Shott,* 382 U. S. 406.

Petitioner and respondents submitted their briefs addressed to the Referee's report, to the Appellate Division, prior to January 16, 1967, the date on which *Spevack* was announced. Thereafter, petitioner had an opportunity to raise the *Spevack* issue when, upon its order of June 6, 1967, the Appellate Division extended petitioner's time

to move for reargument and postponed the effective date of his disbarment. Petitioner submitted motion papers on his plea regarding the imposition of the disciplinary sanction, well after *Spevack,* but never raised the Constitutional issues herein.

Petitioner's position is not, by any standard, analogous to that of petitioners in *Zuckerman and Haber* v. *Greason,* 386 U. S. 15. In that case one of the attorneys, in the course of the disciplinary proceeding, refused to answer on the ground that to do so might tend to incriminate him. Petitioner in the instant case never invoked the privilege, cooperated freely in the hope that the disciplinary sanction would be something less than disbarment (see I, *supra*) and, even after *Spevack,* failed to raise the issue in the Appellate Division on reargument.

IV.

The evidence introduced against petitioner in the disciplinary proceeding was neither tainted nor compelled.

A major portion of the petitioner's brief (pages 16 to 23) is devoted to attacking the reception of evidence before the referee of (1) his testimony before the grand jury (Ex. 11, Pet. Br. 17), (2) the testimony of the witnesses Schrock, Delarato, Sr., Delarato, Jr., Levine, Dwyer and Dr. Margulies (T. 5-114, Pet. Br. 18), (3) his testimony before the Co-ordinating Committee (Ex. 12), (4) his bank records (Exs. 21-25, Pet. Br. 21-22), the maintenance and preservation of which are required by the Special Rules Regulating Conduct of Attorneys promulgated by the Appellate Division, First Department, and (5) the schedules

(Ex. 17) of cases in which he admittedly filed no statement of retainer or closing statement.[4]

Petitioner objects to the introduction in evidence of the grand jury minutes on the same grounds on which he objects to the order making those minutes available to the Co-ordinating Committee. Those grounds, as has been shown (Point I, *supra*), are without merit, as is the convoluted reasoning that six independent witnesses should be barred from testifying because of the possibility that the matters concerning which they testified may also have been within the scope of the grand jury's inquiry (Pet. Br. 18-20). Moreover, petitioner affirmatively consented to the introduction of the grand jury minutes in evidence (T. 231); whatever objection he might otherwise have been entitled to interpose was consequently waived at that point.

His tardy challenge to the admission of the remaining evidence is equally groundless. Exhibits 21, 22, 23, 24 and 25 were "records validly required by law to be kept" within the meaning of *Shapiro* v. *United States,* 335 U. S. 1, 16 to which, as a consequence, "no constitutional privilege against self-incrimination attaches," *id.* at 5. The applicability of the *Shapiro* doctrine to precisely the kind of bank records involved in this case was reaffirmed by the Court of Appeals in *Matter of Spevack,* 16 N. Y. 2d 1048, 1050, *rev'd on other grounds sub nom. Spevack* v. *Klein,* 385

[4] The suggestion (Pet. Br. 17) that any constitutional significance be attached to the fact that petitioner, in his verified answer, admitted the essential allegations of charge 1 cannot be taken seriously. The testimonial privilege of the Fifth Amendment certainly does not extend to formal judicial admissions, which cannot by any stretch of the imagination be deemed "compelled." Even if petitioner's theory of compulsion were valid, it did not deprive him of the right to put the opposing party to his proof by pleading a general denial.

U. S. 511. The validity of that holding is in no way affected by the reversal of Spevack's disbarment on other grounds, since the opinion expressly states that the Supreme Court did not reach that issue, 385 U. S. at 517. (See also the concurring opinion of Justice Fortas, 385 U. S. at 519-520.)

Even if the privilege were applicable to the records in question, however, they were properly received in evidence before the referee on the same basis as petitioner's testimony before the Co-ordinating Committee (Ex. 12) and the schedule of cases concerning which he testified (Ex. 17): none of this evidence was compelled.

The constitutional right petitioner invokes protects a person from being *compelled* to be a witness against himself, U. S. Const., amend. V, N. Y. Const., art. I, §6. Rather than having been compelled, petitioner, in effect volunteered to testify in the disciplinary proceeding, and asked the Appellate Division to weigh that action in his favor. He now asks this Court to rewrite the privilege to provide that "no person shall be a witness against himself"—whether or not compelled. Such a concept is not unknown in jurisprudence (see discussion in Mr. Justice Douglas' opinion in *Garrity* v. *New Jersey, supra,* concerning a basic distinction between Constitutional and Talmudic Law), but it is not the law of the land. Only by adopting a construction of the Fifth Amendment which represents a radical departure from the settled principles of constitutional interpretation can petitioner's argument be sustained.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
AUG 24 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 261

IN THE MATTER OF THE APPLICATION

OF

STANLEY M. KLEBANOFF, an Attorney,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

POINT I

The arguments raised by petitioner in the instant petition are timely raised.

Respondent alleges that being the constitutional issue was not raised before the trial court,[1] then when petitioner raised these constitutional questions before the Court of Appeals,[2] for the first time, these constitutional questions were not timely raised.

[1] In the instant matter the Appellate Division sat as the trial court, it being the Court of original jurisdiction.

[2] In the instant matter the Court of Appeals sat as the first appellate court.

There was no waiver of petitioner's constitutional rights against self-incrimination. A waiver must be a knowing and intelligent choice to proceed *Gideon* v. *Wainright,* 372 U. S. 335; *Cornley* v. *Cochran,* 369 U. S. 506 and how could petitioner waive such right when his free choice had been taken from him under the former law embodied in *Cohen* v. *Hurley,* 366 U. S. 117.

This court has in many cases held that when an appellant could not reasonably have anticipated a new construction placed on a law, then the appellant could not be charged with having failed to raise the question at an earlier stage: *Brinkerhoff-Faris Trust Co.* v. *Hill,* 281 U. S. 673, 677-8; *Hernon* v. *Georgia,* 295 U. S. 441; *Saunders* v. *Shaw,* 244 U. S. 317, 320; *Dahnke-Walker Milling Co.* v. *Bonduvant,* 257 U. S. 282; *Whitney* v. *California,* 270 U. S. 357, 360; *Raley* v. *Ohio,* 360 U. S. 423, 434-6. In *Johnson* v. *Zerbst,* 304 U. S. 458, the court held that every possible presumption against a waiver of a constitutional right must be indulged.

Here, Klebanoff, just as Haber, could not possibly have anticipated a reversal of the *Cohen* v. *Hurley* case and his objection to his disclosures made under compulsion would have been a futility.

This Court has recently decided this issue by its decision in *Zukerman and Haber* v. *Greason,* 386 U. S. 15, a disciplinary proceeding instituted in New York where both Zukerman and Haber were caused to testify while *Cohen* v. *Hurley* was still the law. Zukerman raised the constitutional question of self-incrimination during the initial hearing but Haber did not. At that time, as in the instant matter, it could not be anticipated that *Cohen* v. *Hurley* would be over-ruled and a new construction placed on the law. This court not only remanded the Zuckerman matter, wherein the constitutional question had previously been raised, but

also the Haber matter, where the constitutional question had not previously been raised.

Respondent's allegations that it was petitioner's theory of his case to cooperate so a less severe punishment would be meted out herein is not justified. For an attorney to believe that as an inducement to pleading guilty to charges of professional misconduct and cooperating, the Appellate Division would be more lenient with him is repugnant to our system of justice. Let the punishment fit the crime and let no inducement or promise be made to influence a party to enter a guilty plea and cooperate. These latter theories are basic to our judicial code and known to every attorney. This petitioner cooperated in his self destruction under the compulsion of the existing law of the land, *Cohen* v. *Hurley,* and no other reason and it would have been almost impossible for the respondent to prove most of these charges without the admissions of petitioner.

POINT II

Petitioner was not afforded procedural due process.

Respondent still clings to the theory that a disciplinary proceeding is not criminal in nature and therefore said petitioner is not entitled to certain constitutional guarantees. This theory is directly in conflict with the recent ruling handed down by this court in *In re Ruffalo,* 390 U. S. 544; 88 S. Ct. 1222 wherein it is stated that:

> "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. *Ex parte Garland,* 4 Wall, 333, 380, 18 L. Ed. 366; *Spevack* v. *Klein,* 385 U. S. 511, 87 S. Ct. 625, 628, 17 L. Ed. 2d 574"

It further stated therein that disciplinary proceedings are adversary proceedings of a quasi-criminal nature. *Cf. In re Gault,* 387 U. S. 1, 33, 87 S. Ct. 1428, 1446, 18 L. Ed 2d 527.

And still further pointed out that this petitioner was not afforded proceedural due process during the entire underlying investigation and hearings of his conduct as an attorney. It stated:

> "The charge must be known before the proceedings commence."
>
> "They become a trap when, after they are underway, the charges are amended on the basis of the testimony of the accused."

In the instant matter, petitioner under compulsion of *Cohen* v. *Hurley,* 366 U. S. 117, was forced to testify on three occasions under oath, prior to any charge being brought against him although he was under investigation for certain alleged misconduct gleaned from The Grand Jury Investigation. He was brought in and questioned generally, not only as to those matters under investigation, but, as is the general procedure in The First Judicial District of the Supreme Court of the State of New York, as to a general fishing expedition into petitioners practice, questions that may result and, in the instant matter, did result in further charges being brought against this petitioner,[3] charges of which the respondent would not have been aware of without the testimony of petitioner.

If it is a violation of procedural due process to amend charges brought against an attorney in a disciplinary proceeding based upon said attorney's testimony and to incorporate charges gleaned from such testimony, then, as here,

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[3] Charge 6, co-mingling of funds (see Petition, p. 21).

it is a violation of procedural due process to have this petitioner testify under oath, while under investigation, without any charges brought against him, and based upon said testimony, and only after same, to then bring charges against this petitioner. As stated in *In re Ruffalo*:

> "The charge must be known before the proceedings commence. * * * This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process."

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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